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Indigenous Rights and International Human Rights Courts: Between Specificity and Circulation of Principles

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Indigenous rights and international human rights courts : between specificity and circulation of principles.

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1. Introduction: the emergence of indigenous rights in the context of the human right to a decent environment.

The progressive emergence of indigenous rights is one of the most significant features of contemporary international law and it is part of the more general issue of the relationship between human rights and the environment.

As a matter of fact, indigenous rights have been dealt with by international human rights tribunals in relation to the special link existing between these populations and the surrounding environment.

Therefore, before going into details of the jurisprudence of international human rights tribunals, it is worth recalling some of the challenges that indigenous rights pose to the international system for the protection of human rights¹.

First of all, indigenous rights tend to be collective rights, whereas western legal doctrine is based on individual rights and tends to refuse forms of *actio popularis*, as evidence of the existence of an individual prejudice is required.

Secondly – but the two problems are inextricably linked - the identification of a single titleholder is impossible, as indigenous people are organised in groups². Courts therefore struggle in deciding

1 R.S. PATHAK, *The human rights system as a conceptual frame work for environmental law*, in E.B. WEISS ed., *Environmental Change and International Law: New challenges and dimensions*, Tokyo, 1992, p.233 ss.; M.L. SCHWARTZ, *International Legal Protection for Victims of Environmental Abuse*, in *Yale Journal of International Law*, 1993, p.364 ss.; J.C. MERRILLS, *Environmental Protection and Human Rights: Conceptual aspects*, Oxford, 1996, p.32-33; J. LEE, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of customary International Law*, in *Columbia Journal of Environmental Law*, 2000, p.293 ss.; P.T. TAKOUKAM, *Les individus et le droit de l'environnement*, in *Pour un droit commun de l'environnement : melanges en l'honneur de Michel Prieur*, Paris, 2007, p.685 ss..

2 M. DÉJEANT-PONS, *The Right to environment in Regional Human Rights Systems*, in K.E. MAHONEY, P. MAHONEY, (ed.), *Human Rights in the Twenty-first Century*, The Hague, 1993, p.611-612; see also A.A. CANÇADO TRINDADE, *The contribution of international human rights law to environmental protection, with special reference to global*

whether the duty of the State to guarantee (for instance) a decent environment is owed to the group meant as a collective entity or to the members of the group considered individually³.

Also, once identified the boundaries of the group, it is necessary to establish who can legitimately represent them and act in order to protect their rights; this is particularly evident as far as inter-generational rights⁴ and indigenous rights are concerned.

Finally, given the importance of the environmental dimension in the case-law regarding indigenous peoples, it is necessary to recall some general problems regarding the idea of a human right to a decent environment. This idea has progressively gained strength over the last few years both in international jurisprudence and in the main human rights instruments, at the regional and international level. Still, the doctrine is not unanimous about the effectiveness of a human right-based approach to environmental protection.

The creation of this kind of right upon individuals can make the conciliation of competing rights more difficult, since the right to a decent environment has to be balanced against other individual rights, such as the right to private property; as a consequence, the resolution of the problem, through for example, compromise, will be harder to accept.

Also, the proliferation of rights and of respective titleholders could multiply conflicts and accentuate tensions within society; it has also been observed that the stressing of civil and moral rights could make the realization of values - such as cooperation and civic sense - harder⁵.

Assuming the idea of a human right to a decent environment as “the individual right to be protected also through the protection of one's own environment”⁶, a first difficulty arises from the attribution of a specific meaning to the term “environment”, not only because of the complexity of the term, but also because any meaning assigned to this word must be put in relation with a socio-economic

environmental change, in E.B. WEISS ed., *Environmental Change and international law: New challenges and dimensions*, Tokyo, 1992, p.305.

3 J.C. MERRILLS, *Environmental Protection and Human Rights: Conceptual aspects*, cit., p.34 ss.; E. SPIRY, *Protection de l'environnement et Droit International des droits de l'homme – De la dialectique à la symbiose*, in *Revue de Droit International de sciences diplomatiques et politiques*, 1996, p.178 ss.; G. HERCZEGH, *Droits individuels et droits collectifs (mythes et réalités)*, in *Les hommes et l'environnement : quels droits pour le vingt-et-unième siècle?: études en hommage à Alexandre Kiss*, Paris, 1998, p.171 ss.; F. FRANCIONI, *International Human Rights in an Environmental Horizon*, in *European Journal of International Law*, 2010, p.41 ss.

4 On the issue of inter-generational rights see: E. BROWN WEISS, *In fairness to future generations: International law, common patrimony, and intergenerational equity*, Tokyo, 1988; *Agora: What obligations does our generation owe to the Next? An approach to global environmental responsibility*, in *American Journal of International Law*, 1990, p.190 ss.; J.M. GABA, *Environmental Ethics and Our Moral Relationship to future Generations: Future Rights and Present Virtue*, in *Columbia Journal of International Law*, 1991, p.249 ss.; on the inter-temporal dimension of human rights see: A.A. CANÇADO TRINDADE, *The contribution of international human rights law to environmental protection, with special reference to global environmental change*, cit., p.255 ss.;

5 J.C. MERRILLS, *Environmental Protection and Human Rights: Conceptual aspects*, in A.E. BOYLE, M.R. ANDERSON, *Human Rights Approaches to Environmental Protection*, Oxford, 1996, p.29; on the recognition of “new” human rights see P. ALSTON, *Conjuring up New Human Rights: A Proposal for Quality Control*, in *American Journal of International Law*, 1984, p.607 ss.

6 A. KISS, *Définition et nature juridique d'un droit de l'homme à l'environnement*, in P. KROMAREK, *Environnement et droit de l'homme*, Paris, 1987, p.17.

context⁷. This is the reason why some authors think that the expression “equal environment” can imply the creation of a standard aimed at the preservation of nature at a realistic level, more than the realization of a perfect environment, this objective actually being impossible to obtain⁸.

2. The European Court of Human Rights and indigenous populations.

The European Court of Human Rights (ECHR) was established with the aim of guaranteeing a set of basic civil and political rights, enshrined in the European Convention of Human Rights, signed in Rome in 1950. The Convention is based on a negative approach, and has therefore been conceived as an instrument requiring States to refrain from interfering with individual rights; nevertheless, with the passing of time and the evolution of the international human rights landscape, the application of the Convention changed. European judges are therefore required, nowadays, to interpret this instrument in conformity with the “theory of positive obligations”, according to which States have to actively pursue the objectives stated in the Convention and adopt positive actions in order to make the realisation of rights effective.

Notwithstanding this evolution, the impact of the Convention over the protection of individual rights is limited by some original features, among which the concept of “victim” traditionally applied. According to the Court's consolidated jurisprudence, the notion of “victim” has been the object of a restrictive interpretation: the prejudice must be actual, and not potential; the claimant must show an existing interference in its individual rights, capable of damaging him personally; in other terms, there must be a “direct link” between the claimant and the alleged prejudice⁹.

As we will see in the analysis of the jurisprudence, this feature has a direct impact on the protection of rights of indigenous peoples.

Another important element to be taken into account in order to understand the jurisprudence of the ECHR is the theory of the “margin of appreciation”. The theory, which is both an interpretative and a conceptual tool at the same time¹⁰, was firstly formulated in the well-known *Lawless* case, where the Court stated:

“This being so, and having regard to the high responsibility which a Government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion - a certain margin of appreciation – must be left to the Government in determining whether there exists

⁷ *Ibidem*, p.20.

⁸ H.-J. UEBERFUCH, *Internationally guaranteed right of an individual to a clean environment*, in *Comparative Law Quarterly*, 1977, p.110.

⁹ *Noel Nardvii Tauria and others v. France*, case n. 28204/95, 4 December 1995, p.130; *Soering v. the United Kingdom* case n.14038/88, 7 July 1989, par.90.

¹⁰ O.J.-GUILLARMOD, *Règles, méthodes et principes d'interprétation dans la jurisprudence de la Cour européenne des droits de l'homme*, in L.-E. PETTITI, E. DECAUX, P. LAMBERT, *La Convention européenne des droits de l'homme*, Paris, 1999, p.50: “Au-delà de sa dimension doctrinale, l'idée de la “marge d'appréciation” reconnue aux autorités nationales véhicule aussi (une méthode, qui se trouve en opposition dialectique avec l'idée «d'autonomie» des concepts conventionnels.”

a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention”¹¹.

This concept is therefore central in the analysis of the Court's judicial review, i.e. the intensity of the control over States' actions.

2.1 The recognition of indigenous rights in the internal legal order.

Claims concerning indigenous rights have been brought before the European Court mainly by members of the Sami population, whose lands and hunting rights had been violated by the State.

In the case of *G. and E. v. Finland*, some representatives of the Sami population alleged a violation of article 8 (right to private and family life) and article 1 of the First Additional Protocol (protection of property) due to the construction of a dam, which caused the flooding of the valley where they lived¹². The kind of property claimed by this population was linked to occupation and traditional possession of land, on the basis of categories which are different from those normally used in the Finnish legal order. This is confirmed by the statement, made by claimants, according to which it would have been impossible for them to institute legal proceedings in order to establish their status of legitimate owners of the territory¹³. The Court does not examine this issue in details, but simply states that claimants did not substantiate their property claims guaranteed by article 1 of the First Protocol; the recourse is therefore declared manifestly unfounded.

However, in the case *Könkäma v. Sweden* – where Sami members complain about an amendment to an existing law, to extend exclusive fishing and hunting rights to non-Sami members - rights claimed by Sami villages are considered “possessions” under article 114. The difference in the Court's attitude lies in the fact that the internal legal order recognized Sami rights over land and natural resources: according to Section 25 of the *Reindeer Herding Act*, a member of a Sami village may, with certain restrictions, hunt and fish on the land allocated to the village. This particular section is placed under the heading “*The Exercise of the Reindeer Herding Right*”, indicating that the right to hunt and fish is part of the Sami's immemorial right to herd reindeer. This act is also the basis of Sami rights in the case *Handölsdalen Sami and others v. Sweden*¹⁵.

Finally, in the case *Johtti Sapmelaccat Ry v. Finland*¹⁶, the applicability of article 1 is taken for granted, but here again there was an internal legal basis provided by the 1998 *Fishing Act*.

Therefore, the recognition of indigenous rights seems to be directly linked to the existence of a

11 *Lawless v. Ireland*, case n.332/57, report of the Commission, 19 December 1959, p.85.

12 *G. e E. v. Norway*, case n. 9278/81, 3 October 1983 p.31.

13 *Ibidem*, p.34

14 *Könkäma and 38 Sami villages v. Sweden*, ricorso n.27033/95, decision, 25 november 1996, p.85. Cfr. F. SUDRE, *Droit Communautaire des droits fondamentaux – Année 2000*, in *Revue Trimestrielle des Droits de l'Homme*, 2001, p.910.

15 *Handölsdalen Sami and others v. Sweden*, case n.39013/04, 30 March 2010, par.52.

16 *Johtti Sapmelaccat Ry and others v. Finland*, case n.42969/98, 10 January 2005, p.11.

national law establishing them. If, on one hand, the close relationship existing between the Court and the internal legal order is certainly a heavy burden on the protection of individual rights, on the other hand we have to consider that this feature is not specific to indigenous issues, but is a general characteristic informing the whole Court's jurisprudence. The subsidiary nature of the Court, according to which the Strasbourg system only intervenes if and when individual rights are not duly protected at the national level, has as one of its consequences the fact that the Court relies a great deal on the determinations of internal tribunals and on the existence of an internal source of the allegedly violated rights.

Lastly, it is to be remarked that, in the Strasbourg system, the non-recognition of a certain right has a double set of consequences: applicants will be prevented from invoking not only the provisions of the European Convention directly stating these rights (such as article 1 of the First Protocol), but also the provision affirming the right to due process (article 6), concerning the defence of "civil rights and obligations". In order for this article to be applicable, the Court has to assess the existence of rights (property is a typical example) for the protection of which the claimant submits a recourse; as a consequence, if the Court does not admit the existence of these rights, the denial of justice sometimes suffered by indigenous populations (under the form of lack of access to a tribunal) cannot be analysed at the light of the European Convention.

On the contrary, in the jurisprudence of the Inter-American Court, the duty of the State to guarantee the enjoyment of the rights included in the Convention is the starting point; therefore, failure to provide the recognition of rights does not exempt the State from responsibility – as it would be according to a formalistic approach, because if the right does not exist, there is no point in invoking it. On the contrary, in the light of the principle of effectiveness and of the "need of protection of vulnerable individuals", a broad interpretation of the right to recognition to juridical personality be followed, with the consequence that the State is especially bound to guarantee this right to people in the situation of necessity and vulnerability¹⁷.

2.2 Evidence of prejudice: a heavy burden of proof.

Another problem faced by indigenous peoples' representatives in the European system is the burden of proof required by the Court in order to show the existence of a prejudice. In the case *G. and E. v. Norway* mentioned above, judges recognized that, in principle, article 8 of the Convention protects the right of minorities to conduct their traditional lifestyle¹⁸ and they admit the negative effects that the construction of the dam would have on their quality of life. On the other side, they underline that Sami populations were not actually prevented from practising fishing, farming and hunting

¹⁷ *Xákmok Kásek indigenous Community v. Paraguay*, 24 August 2010, Series C n.214, par.249-250.

¹⁸ *G. and E. v. Norway*, cit., p.35.

activities¹⁹; more precisely, they underline the existence of wide areas, situated in the north part of Norway, suitable for these activities. As a consequence, the area compromised because of the construction of the dam was relatively small²⁰; this factor - matched with the idea, inspired by an effectiveness principle, according to which claimants were able to continue their traditional activities – determines a lessening of the damage suffered.

The Court then recalls the second paragraph of article 8 (listing some objectives for the realisation of which the State can legitimately limit the right to private and family life), with the aim of balancing individual rights on one hand and national interests on the other. Still, the reasoning followed is open to criticism where it affirms that, “without ascertaining the extent and nature of the interference” with individual rights, after careful consideration of the necessity of the project, the interference can reasonably be justified²¹. The balancing process appears to be biased, as the two competing interests are assigned different values: the prejudice of individual rights is not subject to a careful assessment, whereas the necessity of the project is the object of “careful consideration”. It is therefore reasonable to question, in the light of this balancing exercise, how the construction of the dam can be considered “reasonably necessary”. Moreover, the lessening of the prejudice (deriving from the availability of other lands assigned to carrying out traditional activities) had already established the premises for a de-valuation of claimants' traditional lifestyle.

The attitude of the Court is a typical example of how the margin of appreciation doctrine can operate in favour of the State: faced with a conflict between the rights of a minority and the economic interests deriving from important public works, the Court clearly sides with the latter. The ambivalence of the margin of appreciation doctrine clearly emerges: as has already noted by doctrine, the margin of appreciation acts sometimes as an element at the basis of the deference of the Court towards the State, and other times as a pretext for this deference which is, in a certain sense, established *a priori*²².

A similar pattern is found in the case of *Johtti Sapmelaccat Ry v. Sweden*, where the Court notes that “the precise scope of the traditional fishing and other rights belonging to the Sámi population” was not clear at the relevant time” and that this seems to be a complex legal, historical and political issue. Starting from the assumption that the piece of legislation challenged by the claimants had not been drafted with the aim of reducing Sami rights, the Court states that the national measure “does not seem to have changed the substance” of the existing regulation. As a consequence, the

19 *Idem*.

20 *Ibidem*, p.36.

21 M. DEJEANT-PONS, *Le droit de l'homme à l'environnement, droit fondamental au niveau européen dans le cadre du Conseil de l'Europe, et la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*, cit., p.380.

22 As affirmed by R. DESGAGNÉ (*Integrating environmental values into the European Convention on Human Rights*, in *American Journal of International Law*, 1995, p.551) “The Court must be well aware that its “margin of appreciation” is an easy device for deference to the defendant State” (emphasis added).

applicants' legal status has not been weakened²³.

The conclusion of the Court is that claimants have not succeeded in showing the impact of the new law on their likelihood of exercising traditional fishing rights. In particular, the imposition of fees for fishing licenses is not considered relevant, as they do not apply to Sami fishing rights and the aim pursued by the law (the protection of fish stock) is considered a legitimate objective, justifying the interference in individual rights²⁴.

2.3 The denial of the victim status to associations representing indigenous rights.

According to article 34 of the European Convention, complaints can be introduced by individuals, groups, or non-governmental organisations²⁵.

Therefore, the Convention contemplates the possibility, for a collective entity such as an association representing indigenous peoples, to act on behalf of its members. Still, this possibility has to be reconciled with the requirements stemming from the victim status and with the prohibition of *actio popularis* mentioned in the introduction.

This poses a serious obstacle to the representation of indigenous rights, which are very often collective in nature.

In the case *Johtti Sapielacat Ry and others v. Finland*, the victim status of the NGO representing indigenous interests is denied, because the claimant association is not responsible for fishing and does not represent its members in this regard. Moreover, the rights designated in the *Fishing Act* (the national measure under challenge) can be exercised by a Sami only as a private individual²⁶. Two elements are crucial in this reasoning. First of all, the restrictive approach adopted by the Court in determining the association's status: if we consider that the aim pursued by Johtti Sapielacat Ry is the promotion of Sami culture, it follows that the only condition under which the victim status could have been recognized was a complete coincidence between the object of the claim and the aim pursued by the association.

Secondly, the conception of rights adopted by the Court – affirming that fishing rights can only be exercised by individuals – completely fails to take into account the collective dimension of indigenous culture.

On the contrary, the victim status of the claimant is not put into discussion both in the *Konkämä*

23 *Johtti Sapielacat Ry v. Sweden*, cit., p.18.

24 *Idem*.

25 On the notion of victim as applied by the ECHR see: K. ROGGE, *The «victim» requirement in Article 25 of the European Convention on Human Rights*, in F. MATSCHER, H. PETZOLD, *Protection des droits de l'homme: la dimension européenne*, cit., p.539; R. DESGAGNÉ, *Integrating environmental values into the European Convention on Human Rights*, in *American Journal of International Law*, 1995, p.284; A. BULTRINI, *Il meccanismo di protezione dei diritti fondamentali della Convenzione europea dei diritti dell'uomo. Cenni introduttivi*, in B. NASCIBENE, *La Convenzione europea dei diritti dell'uomo*, Milano, 2002, p.18.

26 *Johtti Sapielacat Ry and others v. Finland*, cit., p.12.

case²⁷ and in the *Handölsdalen Sami Village* case²⁸: here, the villages are the legitimate titleholder of the disputed rights on the basis of four different factors: prescription from time immemorial; national laws concerning reindeer grazing and husbandry; custom; public international law, and especially article 27 of the UN Covenant on Civil and Political Rights.

If, on one hand, this confirms the possibility, for an association, to be recognised victim status, on the other, it also confirms the strict approach followed by the Court.

3. The jurisprudence of the Inter-American Court of Human Rights.

The jurisprudence developed by the Inter-American Court in the sector of indigenous rights is characterised by a much more favourable attitude. Among the reasons for this difference we can include, in the first place, a statistical factor: indigenous populations are far more numerous in the American continent, and this has given rise to a higher number of cases. As a consequence, the Court has been “trained” to deal with this subject and has developed a different sensitivity in this regard.

Secondly, the Inter-American Convention is a newer instrument if compared to the European Convention and it is less constrained by the “negative” conception of rights (which inspired the earlier European Convention).

The principles developed by the Inter-American Court found their highest expression in the famous *Saramaka* case²⁹ and, more recently, in the case *Xákmok Kásek indigenous Community v. Paraguay*.

3.1 The refusal of a formalistic approach in dealing with procedural matters.

One of the main features of the *Saramaka* case is the refusal, on the part of the Court, of the preliminary objections submitted by the State; these objections concerned the capacity of the claimants to act as representatives of the Saramaka peoples and their legal standing before the Court.

As far as the first aspect is concerned, the respondent State questioned the capacity of the Association of Saramaka Authorities and of the Saramaka captains to file a petition in front of the Inter-American Commission, as they did not consult the Saramaka supreme leader. This implied a violation of article 44 of the Inter-American Convention, as the petitioners had no authorization to act on behalf of the whole community³⁰. Article 44 is similar to article 34 of the European Convention, and states that “any person or group of persons, or any non-governmental entity legally

27 *Konkämä and 38 Sami villages v. Sweden*, cit., p.85-86.

28 *Handölsdalen Sami and others v. Sweden*, cit., par.10.

29 L. BRUNNER, *The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court on Human Rights*, in *Chinese Journal of International Law*, 2008, p.699 SS; M.A. ORELLANA, *Saramaka People v. Suriname*, nota nella sezione “*International decisions*”, in *American Journal of International Law*, 2008, p.848 SS.

30 *Case of Saramaka people v. Suriname*, cit., par.19.

recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention by a State party”.

Following customary norms of treaty interpretation, and taking into account the principle of *effet utile*, the Court analysed article 44 in conformity with the object and purpose of the treaty and affirmed that the “broad authority to file a petition is a characteristic feature of the Inter-American system for the protection of human rights” and, quoting previous case-law, stated that a person or a group of persons other than the alleged victim can file the petition³¹.

On the basis of these premises, the necessity of obtaining the authorization of the leader of a community before submitting a petition on behalf of this latter was refused. “[T]he possibility of filing a petition” - we read in the sentence - “has been broadly drafted in the Convention and understood by the Tribunal”³². Therefore, not only the issue of representation is settled by the Court in a manner favourable to the indigenous community, but this situation is also a chance, for judges, to reaffirm the extensive approach informing the Convention and the Inter-American system. The reference, made by the Court, to the principle of *effet utile*, is of great importance, as it suggests the idea that a strict interpretation of formal requirements would be tantamount to a frustration of the aims pursued by the Convention. Finally, it is worth remarking that, once the formal problem of representation is solved, there is no *actio popularis* issue: nobody questions the fact that the complainants (the NGO and the representatives) and/or the persons on behalf of whom they act are personally and individually affected by the State behaviour. In other terms, we are very far away from the notion of victim generally applied by the ECHR.

The second preliminary objection concerns the *locus standi* of the Saramaka representatives in front of the Court: according to the provisions of the Inter-American Convention, only States and international organisations can appear before the Court and only the Commission has the capacity to represent individuals' rights. Only once the Commission has submitted the complaint to the Court, can victims introduce autonomous requests and arguments³³.

The Court, though recognizing the limits set by the Convention to the participation of individuals to the system, states that “preventing the alleged victims from advancing their own legal arguments would be an undue restriction upon their right of access to justice, which derives from their condition as subjects of international human rights law.” In more general terms, “At the current stage of the Inter-American system [...] the empowerment of the alleged victims, their next of kin or representatives to submit pleadings [...] autonomously must be interpreted in accordance with their position as titleholders of the rights embodied in the Convention”.

31 Ibidem, par.22.

32 Ibidem, par.23.

33 Ibidem, par.25.

The relevance of this statement is blatant; still, some observations can be formulated. First of all, similarly to what we observed as far as the first preliminary objection, the Court seems to establish an equivalence between effectiveness of rights and extensive interpretation of procedural requirements.

Secondly, this extensive interpretation finds a further source of legitimisation in the role of the individual not only in the Inter-American system but also in general international law.

The strength of these arguments appear even more clearly if we consider that, differently from the first preliminary objection, here the issue raised by the State is dealt with through an actual derogation from the Convention provisions, which explicitly reserve the possibility of submitting a complaint to the Commission. Here, the European system appears much more advanced: the individual has a pivotal role in the procedure, based on its direct dialogue with the Court.

3.2 The recognition of the specificity of indigenous people and the necessity of actions of positive discrimination.

One of the first points made by the Court in its sentence is the fact that the Saramaka people constitute a distinct tribal group with a special relationship with their territory. This premise is essential, because it is the element that founds the special treatment these groups are entitled to and the corresponding duties on the part of the State.

Among the distinctive features of the Saramaka people is the existence of matrilinear clans, governed by local leaders³⁴. The most relevant element, however, is the “strong spiritual community with the ancestral territory” they have traditionally used and occupied. Land is a source for the continuation of their life and cultural identity and it is part of their cultural, social and ancestral essence. Lands occupied by the communities are not only the physical place where they carry out their economic activities, but are also where their cultural and spiritual life takes place: the territory therefore has a sacred value³⁵.

The Court then confirms its previous case law³⁶, according to which indigenous peoples require special measures that guarantee the full exercise of their rights and, especially, the enjoyment of property rights, with the aim of safeguarding their physical and cultural survival³⁷. These factors are therefore at the basis of the special approach adopted.

In the case submitted to the European Court by Sami communities these factors are almost completely neglected; nevertheless, the special relationship of a community with the territory did

³⁴ *Case of Saramaka people v. Suriname*, cit., par.81.

³⁵ *Ibidem*, par.82.

³⁶ *Case of Mayagna (Sumo) Awas Tigni Community*, 31 August 2001, Series C n.79, par.148-149 and 151; *Case of Indigenous Community Sawhoyamaya v. Paraguay*, 15 June 2005, Series C n.124, par.118-121 and 131; *Case of Indigenous Community Yakye Axa v. Paraguay*, 17 June 2005, Series C n.125, par.124, 131, 135-137, 154.

³⁷ *Case of Saramaka people v. Suriname*, cit., par.85.

receive some kind of regard in the jurisprudence concerning travelling peoples. The analysis of this case-law is outside the scope of the present work, because of the specificity and complexity of the issues involved (cases submitted to the ECHR mainly concern the occupation of public space for residential purposes and forced evacuation by police forces) and the very same qualification of travelling people as “tribal or indigenous community” is open to debate. Still, it is interesting to highlight that the recognition of the special traditions of travelling people and of the necessity of adopting positive measures in order to guarantee their rights and cultural identity does not lead the Court to divert from the standard approach based on the legality principle. In other terms, as incisively stated in the case *Jane Smith v. the United Kingdom*, “The Court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site”³⁸.

In this sense, it is also worth recalling the importance given by the Inter-American Court to the principle of non-discrimination, defined as a principle of *jus cogens*. It goes without saying that a legalistic approach such as the one used by the European Court can hardly be said to grant the principle such a high value³⁹.

3.3 The full recognition of the communal system of property and the relationship between possession of land and other human rights.

The case-law of the Inter-American Court regarding communal property has been recently confirmed in the case *Xákmok Kásek indigenous Community v. Paraguay*. The underlying idea of the reasoning of the Court is that “the close link that indigenous peoples have to their traditional lands, to the natural resources found that are part of their culture, and to the lands' other intangible elements, should be safeguarded by Article 21”⁴⁰. This first element is put in relation with the communal tradition of collective property, meant as the ownership of the land to the group and not to the individual; moreover, the relationship with the land is not merely a “matter of possession and production”, but also a material and spiritual element⁴¹. Communal property means that possession “does not focus on individuals but on the group and the community” and, as a consequence, this conception does not necessarily coincide with the ideas of ownership and possession existing in internal legal orders⁴². Still, it deserves “equal protection” under article 21 of the Inter-American Convention, relating to the right to property.

This last statement is of paramount importance, as it is the root and the basis of the whole

38 *Jane Smith v. the United Kingdom*, case n.25154/94, 18 January 2001, par.109.

39 *Xákmok Kásek indigenous Community v. Paraguay*, *cit.*, par.270.

40 *Xákmok Kásek indigenous Community v. Paraguay*, 24 august 2010, par.85.

41 *Ibidem*, par.86.

42 *Ibidem*, par.87.

jurisprudence of the Inter-American Court concerning the right to property of indigenous people: the specificity of the concepts of possession and ownership used by indigenous communities must not determine a different application of article 21 but, on the contrary, it determines a commitment on the part of the State to guarantee an effective application of the Convention. “The failure to recognize the different versions of the right to use and enjoy goods that come from the culture, uses, customs, and beliefs of different peoples would be equivalent to arguing that there is only one way for things to be used and arranged, which in turn would make the protection granted by article 21 of the Convention meaningless for millions of individuals”⁴³.

The status of collective rights in public international law has also been the object of the concurring opinion of Judge Grossi, whose relevance is remarkable not only for the case at issue, but also for the evolution of public international law. After having underlined the existence and the importance of collective rights, which are sometimes a precondition for the enjoyment of other rights enshrined in the Inter-American Convention⁴⁴, the Judge makes some general statements whose scope goes well beyond the dispute under examination:

“It can be concluded that, pursuant to the progressive development of the International Law of Human Rights, it follows, on the one hand, to include the term “person” contained in various Articles of the Convention and as victims of human rights violations enshrined in it, not only the members, considered individually, of indigenous peoples, but also in regards to them as such, and on the other hand, consequently to consider among those rights those that pertain to the said peoples, because justice would not only be served, but, in addition, the jurisprudence would situate, more clearly and without margin for error, *in the modern trend that is surfacing with more clarity in International Law that regulates this subject matter*”⁴⁵.

The difference with the jurisprudence of the European Convention is striking: in the cases concerning Sami populations, the discrepancy between the kind of property claimed by Sami people and the one existing in internal legal orders was used by the Court in order *not* to recognize indigenous rights, unless these rights found some kind of recognition in the internal legal order itself. It will be interesting to see if and how the ECHR will deal with this issue in the future, as it will be very hard (if not impossible) not to take this general - and authoritative - statement into account.

Once recognized that article 21 of the Convention offers full protection to indigenous lands, the Court is free to recall its previous case-law, in order to determine the duties of the State stemming from this protection: indigenous’ traditional possession of their lands has the same effect as a full land title granted by the State, which is obliged to delimit, demarcate, and grant collective title of

43 Idem.

44 Ibidem, par.24.

45 Emphasis added.

the lands⁴⁶.

Another relevant contribution of the *Xákmok Kásek* sentence concerns the possibility, for the State, to justify the deprivation of land suffered by traditional communities on the basis of the impossibility, for the State, to expropriate the land, when this impossibility comes from the different economic productivity resulting from the use made by land by private landowners on the one hand and by the indigenous community on the other. The Court underlined that “the mercantilist perspective of the value of land, which views it only as a means of production in order to generate “wealth,” is inadmissible and inapplicable when it comes to the indigenous question, as it assumes a limited vision of reality, upon failing to consider the possibility of a concept different from our ‘western’ way of seeing issues of indigenous rights and upon arguing that there is only one way to use and dispose of goods”⁴⁷.

Closely linked to this subject is the analysis of the impact that deprivation of land had on indigenous communities' lifestyle: the “collective cultural exhaustion” faced by the villages is one of the most serious consequences of State's failure to restore land⁴⁸. Traditional possession of land forms part of their identity which, in turn, “has a unique character due to the collective understanding they receive as a group”⁴⁹.

The European Court was never called to pronounce itself on such a specific aspect when dealing with the rights of Sami populations; still, in the *Könkama* case, when considering the existence of a prejudice to the interests of the community, it solely focused on the economic dimension. In this sense, it is also interesting to recall a recent decision by the Tribunal of First Instance of the European Union, faced with a question of legitimacy of a European regulation banning production, selling and trading of seal products. The Tribunal denied the existence of a direct and personal impact of the regulation on the Sami population, basing its analysis on purely economic elements and disregarding the cultural dimension underlined by the claimants⁵⁰.

Still, reducing State responsibility to the violation of the right to property (even considering the non-economical dimensions of this right) would not reflect the actual situation suffered by the indigenous community ; that is why one of the rights invoked by the claimants, and recognized by the Court, is the right to life.

In other terms, failure to restore land is not only a violation of the right to property, but also an infringement of this inalienable and absolute right, whose respect is a prerequisite for the enjoyment of all other rights⁵¹. Here the jurisprudence of the Inter-American Court appears to be close to the

46 Ibidem, par.109.

47 Ibidem, par.148.

48 Ibidem, par.172.

49 Ibidem, par.175.

50 *Inuit Tapiriit Kanatami and others v. Parliament and Council*, case T-10/18, 30 April 2010.

51 *Xákmok Kásek indigenous Community v. Paraguay*, cit., par.186.

one of the ECHR: right to life encompasses not only the prohibition, for State's authorities, to intentionally deprive somebody of his life (negative obligation), but also a duty to carry out positive actions in order to guarantee this right (positive obligation)⁵².

Still, the difference between the two systems for the protection of human rights derives from the fact that the European Court has never contemplated a violation of the right to life in situations different from the death of individuals and, therefore, even the more so in situations of the deprivation of a material good.

On the contrary, according to the Inter-American Court, the State is responsible on one hand of the death of some individuals⁵³, directly caused by the conditions they were obliged to live in (and the State was fully informed of) and, on the other hand, of the right to a dignified existence. The violation of this latter is analyzed by taking into consideration different factors: the access to and the quality of water⁵⁴; the diet of the indigenous community⁵⁵; the access to healthcare services⁵⁶; education⁵⁷. Of course these allegations have an autonomous aspect (as, for example, the State is obliged to provide medical care independently from individuals' place of residence); still, in practical terms, they are strongly linked to the problem of land deprivation, because the lack of services and the existence of dangerous conditions alleged, took place in the territories where the community was forced to live.

This is confirmed by a report drafted by State officials, which “confirmed the state of vulnerability and necessity in which the members of the community were found *because they did not have title to their land*”⁵⁸.

4. The Endorois case before the African Commission of Human and Peoples' Rights: an interesting example of dialogue among international human rights courts.

The *Endorois* case derives from a complaint submitted by a NGO (the Centre for Minority Rights Development) on behalf of an indigenous community displaced by its ancestral land by their national State, Kenya⁵⁹. The complainants alleged that the forced displacement constituted a violation of the Constitution of Kenya, of international law and of the African Charter of Human and Peoples' Rights.

This sentence is an interesting example of how indigenous issues are being dealt with by the most

52 Ibidem, par.187.

53 Ibidem, par.218 ss.

54 Ibidem, par.194 ss.

55 Ibidem, par.197 ss.

56 Ibidem, par.203 ss.

57 Ibidem, par.209 ss.

58 Par.189 (emphasis added).

59 For a comment of this sentence see: S. VEZZANI, *L'unicorno esiste (ed è africano): il diritto allo sviluppo nel rapporto della Commissione africana dei diritti umani e dei popoli nel caso degli Endorois*, in *Diritti umani e diritto internazionale*, 2010, p.603 ss.

recent system for the protection of human rights and, above all, of the circulation of principles taking place among international tribunals.

Rights alleged to have been violated are article 8 (right to practice religion); article 14 (right to property); right 17 (right to culture); article 21 (right to free disposition of natural resources); right 22 (right to development).

Starting from the very definition of “indigenous peoples”, the African Commission shows (even if implicitly) to build on the jurisprudence of the Inter-American Court, but also to add new elements: according to African judges, the term “indigenous” is not intended to “create a special class of citizens”, but to “address historical and present-day injustices”⁶⁰. If, on the one side, this statement reminds of the “special treatment” mentioned in the *Saramaka* case and, in a certain sense, of the positive discrimination encouraged by some European judges, on the other hand it goes one step further: the treatment accorded by the State to indigenous peoples is not a consequence of the intention to respect the identity of these communities; rather, the choice itself is to use the term “indigenous” aimed at granting this respect.

The emphasis put by the African Commission on collective rights characterizing indigenous communities is underlined (also) through comparison with other international human rights instruments; with respect to these, the African Charter is “an innovative and unique [...] document, in placing special emphasis on the rights of people”⁶¹. It is therefore the Court itself underlying its own specificity.

Finally, the *Saramaka* case of the Inter-American Court is recalled in order to confirm the idea that collective rights protection has to be granted to groups beyond the “aboriginal understanding”, i.e. not only to indigenous peoples, but also to any group having the characteristics of a tribe⁶².

A further example of circulation of principles is the one relating to the right to freely practice one's own religion: here the sentence shows several references to the case-law of both the Human Rights Council⁶³ (called to interpret and apply the UN International Covenant on Civil and Political Rights) and the Inter-American Commission of Human Rights⁶⁴. These references are aimed at strengthening the idea of a broad interpretation of the term “religion” and of the centrality of practice to religious freedom respectively.

As far as article 14 (right to property), the Commission recalls its own jurisprudence, but also the case-law of the ECHR, according to which property rights “could also include the economic

60 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, case n.276/2003, par.149.

61 *Idem*.

62 *Ibidem*, par.159.

63 *Ibidem*, par.164.

64 *Ibidem*, par.171.

resources and rights over the common land of the applicants”⁶⁵. It is interesting to note that the case quoted by the African Commission does recognize the possibility of considering certain rights and interests different from ownership of physical goods as “property rights” (therefore “possessions”) for the purpose of article 1 of the First Protocol⁶⁶; still, it is also necessary to highlight that this case is not related to indigenous populations, but to the situation of internally displaced persons and especially of Kurdish people living in Turkey⁶⁷.

Further, the African Commission recalls the *Mayagna (Sumo) Awas Tigni case*, where the Inter-American Court stated that possession of land must suffice for indigenous communities in order to claim title over land⁶⁸. The duty for the State to recognize an indigenous group and therefore to grant it the right to juridical personality (necessary, in turn, to claim the right to property) finds its basis in the *Saramaka case*, whose main findings are summarized⁶⁹.

When it comes to the concept of positive discrimination, the reference is to the European Court and, precisely, to the *Connors case*, belonging to the set of cases focused on the situation of travelling people⁷⁰. As it has been explained before, it would be hard to frame these cases solved by the ECHR into the conceptual framework of indigenous issues; still, the idea of non-discrimination developed within the “minorities sector” is reinterpreted by the African Commission in order to reinforce its arguments as far as indigenous rights are concerned.

The necessity of “special measures” of protection owed by the State to the members of tribal communities is further confirmed through the Inter-American jurisprudence⁷¹ and another sentence issued by the ECHR regarding forced evictions of Kurdish people by Turkish police forces⁷² is recalled, in order to underline the need *both to respect and protect* the rights enshrined in the Convention⁷³.

Here the African Commission does not go into details of the European case-law and it is difficult to understand the value of this last reference, considering that a similar case has already been quoted when dealing with the autonomous meaning of the term “possession”. The point to be underlined (and which emerges from the use of italics in the text) is the value of the terms “respect” and “protect”: while the former merely indicates the duty of the State to abstain from behaviors that can violate the individual right, the latter refers to the theory of positive obligations and therefore to the

65 Ibidem, par.186 e 188.

66 In this sense see also the *Oneryildiz case*, relating to the rights and interests of the inhabitants of a bidonville (*Oneryildiz v. Turkey*, case n.48939/99, 30 November 2004, par.124)

67 *Case of Doğan and others v. Turkey*, case n. 8803-8811/02, 8813/02 and 8815-8819/02, 29 June 2004, par.55 ss.

68 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, cit., par.190.

69 Ibidem, par.192 ss.

70 Ibidem, par.196 footnote n.99. *Connors v. the United Kingdom*, case n.66746/01, 27 May 2004.

71 Ibidem, par.197-199.

72 Ibidem, par.202.

73 Ibidem, par.202.

duty of the State to adopt positive measures in order to allow the enjoyment of rights.

Still, *de facto* ownership is not sufficient, as only *de jure* ownership can fully realise indigenous rights; again, this idea is affirmed through recourse to the Inter-American jurisprudence⁷⁴.

The most striking example of dialogue among human rights courts is the reference made by African judges to the principle of proportionality, as applied by the ECHR in order to assess limitation of individual rights when there is a legitimate public interest. Here a leading case in the ECHR jurisprudence (the *Handyside* case⁷⁵) is recalled, in order to affirm the idea that limitations of rights must be proportionate⁷⁶.

The pattern described so far is repeated (mainly with reference with the *Saramaka* jurisprudence) for all the other rights claimed by the *Endorois*.

Therefore, summarizing, it is not an exaggeration to say that the whole *Endorois* sentence is a network of concepts made through continuous reference to the practice of other international human rights tribunals. If, with regard to some aspects, the African judges like to underline their own specificity, in most cases external jurisprudence is a tool in order to give authority to the decision the African Commission wants to make.

Conclusion.

One of the effects of the fragmentation of international law is the multiplication of jurisdictional entities dealing with the same or similar subjects. Actors involved in this process are well-aware of each others and willing to communicate.

Regional specificity is therefore balanced with the advantages of the emergence of a “common core” of principles concerning different sectors of international law, among which are indigenous rights. In this landscape, it is interesting not only to identify the emerging principles, but also to underscore the different roles and contributions of the players involved.

Recent instruments and players are the carriers of innovative and “freer” ideas: this is evident, for example, if we consider the African system, where the collective nature of rights is somehow taken for granted and which, being a recent system, is not bound by heavy legacies such as rigid conceptual frameworks (see the concept of victim for the ECHR).

On the other hand, when an authoritative source is necessary an old system such as the European one gives an essential contribution (see the principle of proportionality).

The process of cross-fertilization we observe is an extremely interesting one, because quoting a source is not just a “passive” action of carrying a concept or an idea into a system. Rather, it is also an active, creative process, giving the quoted source new life and, sometimes, a new interpretation.

⁷⁴ Ibidem, par.205-208.

⁷⁵ *Handyside v. the United Kingdom*, case n.5493/72, 7 December 1976.

⁷⁶ Ibidem, par.213.

This could be the case, for example, of the ECHR case-law on the concept of possession: the reference to the ECHR case-law relating to the likelihood of a broad interpretation of this term, which has appeared in cases relating to internally displaced people, but quoted by the African Commission with respect to indigenous communities, could stimulate the European judge to widen its perspective on the issue.

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